

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Apr 10, 2025**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MICHELE D.,<sup>1</sup>

Plaintiff,

v.

LELAND DUDEK, ACTING  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>2</sup>

Defendant.

No. 1:23-CV-03132-RHW

ORDER RULING ON CROSS-  
MOTIONS FOR REMAND AND  
REMANDING FOR THE AWARD  
OF BENEFITS AND  
CLOSING THE FILE

**ECF Nos. 9, 20**

Before the Court is Plaintiff's Opening Brief and the Commissioner's Motion for Remand following the denial of disability insurance benefits and a period of disability under Title II of the Social Security Act. ECF Nos. 9, 20. Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorneys L. Jamala Edwards and Shata Stuckey represent the Commissioner. The parties agree the administrative law judge (ALJ) erred when analyzing the medical opinions, but the parties disagree as to the appropriate remedy. After reviewing the

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<sup>1</sup> To address privacy concerns, the Court refers to Plaintiff by first name and last initial or as "Plaintiff." *See* LCivR 5.2(c).

<sup>2</sup> Pursuant to Federal Rule of Civil Procedure 25(d), Leland Dudek, Acting Commissioner of Social Security, is substituted as the named Defendant.

1 record and relevant authority, the Court grants Plaintiff's motion to reverse the  
2 decision of the Commissioner and remands for the immediate calculation and  
3 award of benefits.

#### 4 **BACKGROUND**

5 The facts of the case are set forth in detail in the transcripts of the  
6 proceedings and the ALJ's decision and only briefly summarized here. Plaintiff  
7 was born in 1968 and was 49 years old on the date last insured on March 31, 2018.  
8 Her past employment includes work as a bakery manager, fast food worker, and  
9 cashier.

10 Plaintiff's application for disability insurance benefits has been pending over  
11 a decade, has involved four administrative hearings, and required two prior  
12 remands for further proceedings from federal court. At age 44, Plaintiff filed an  
13 application for disability insurance benefits in May 2013, claiming disability  
14 beginning October 31, 2012, based on migraine headaches, anxiety, obesity, pain,  
15 dizziness, and somatoform disorder. Tr. 171-180.

16 After the agency denied benefits, an administrative hearing was held before  
17 ALJ Mary Gallagher Dilley in March 2015. Tr. 35-69. The ALJ denied benefits.  
18 Tr. 16-34. In 2018, on appeal to federal court, Judge Salvador Mendoza remanded  
19 the matter for further proceedings due to the ALJ's failure to properly consider the  
20 medical evidence. Tr. 473-98.

21 On remand, two further administrative hearings were held. The first hearing  
22 occurred in April 2019 before ALJ Dilley and a vocational expert. Tr. 1080-1115.  
23 Subsequent to the hearing, ALJ Dilley sent a medical interrogatory to Dr. Arnold  
24 Ostrow and Plaintiff requested a supplemental hearing. The supplemental hearing  
25 was held in June 2020 before a different ALJ, ALJ Glenn Meyers and a vocational  
26 expert. Tr. 407-444. On June 15, 2020, eleven days after the hearing, the ALJ  
27 denied benefits, without having reviewed the transcript of the first remand hearing  
28 in April 2019. Tr. 386-406. Plaintiff appealed a second time to federal court. The

1 Commissioner conceded that the ALJ had erred again in evaluating the medical  
2 evidence, this time by giving the opinion of C. Donald Williams, M.D., a  
3 psychological consultative examiner, “great weight,” but failing to account for the  
4 assessed marked limitation in the ability to respond to usual work situations and  
5 changes in work setting. Tr. 1215. The ALJ considered the mild and moderate  
6 limitations assessed by Dr. Williams, but failed to address his conclusion that  
7 Plaintiff was unable to keep a job. Tr. 1216. Judge Mendoza remanded the matter  
8 a second time for further proceedings, though noting that Plaintiff’s evidence,  
9 “when credited, constitutes convincing evidence of disability.” Tr. 1209-10.

10 On second remand from federal court, a fourth administrative hearing was  
11 held in May 2023 before the same ALJ who had previously denied Plaintiff  
12 benefits. Tr. 1145-1175. The ALJ denied benefits on June 30, 2023. Tr. 1116-  
13 1144. The ALJ’s 2023 decision became the final decision of the Commissioner,  
14 which is appealable to the district court pursuant to 42 U.S.C. § 405(g). 20 C.F.R.  
15 § 404.984(d). Plaintiff filed this action for judicial review on September 11, 2023.  
16 ECF No. 1.

### 17 STANDARD OF REVIEW

18 The ALJ is tasked with “determining credibility, resolving conflicts in  
19 medical testimony, and resolving ambiguities.” *Andrews v. Shalala*, 53 F.3d 1035,  
20 1039 (9th Cir. 1995). The ALJ’s determinations of law are reviewed *de novo*, with  
21 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,  
22 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed  
23 only if it is not supported by substantial evidence or if it is based on legal error.  
24 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is  
25 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at  
26 1098. Put another way, substantial evidence “is such relevant evidence as a  
27 reasonable mind might accept as adequate to support a conclusion.” *Richardson v.*  
28 *Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305

U.S. 197, 229 (1938)). If the evidence is susceptible to more than one rational interpretation, the Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1098; *Morgan v. Comm'r of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Sec'y of Health and Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988).

### SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four the claimant bears the burden of establishing a prima facie case of disability. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a physical or mental impairment prevents the claimant from engaging in past relevant work. 20 C.F.R. § 404.1520(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show (1) that Plaintiff can perform other substantial gainful activity and (2) that a significant number of jobs exist in the national economy which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1497-1498 (9th Cir. 1984); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012). If a claimant cannot make an adjustment to other work in the national economy, the claimant will be found disabled. 20 C.F.R. § 404.1520(a)(4)(v).

### ADMINISTRATIVE DECISION

On June 30, 2023, the ALJ issued a decision denying benefits. Tr. 1116-1144.

1 At step one, the ALJ found Plaintiff, who met the insured status  
2 requirements of the Social Security Act through March 31, 2018, had not engaged  
3 in substantial gainful activity since the alleged onset date. Tr. 1121.

4 At step two, the ALJ determined Plaintiff had the following severe  
5 impairments: migraine headaches, obesity, cirrhosis of the liver, somatoform  
6 disorder, and anxiety disorder. *Id.*

7 At step three, the ALJ found Plaintiff did not have an impairment or  
8 combination of impairments that met or medically equaled the severity of one of  
9 the listed impairments. Tr. 1122.

10 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found  
11 she could perform sedentary work, with the following limitations:

12 [Plaintiff] must have been provided a sit/stand at will option at work;  
13 she could have lifted and/or carried ten pounds occasionally and  
14 frequently; she could have no contact with the public; she was capable  
15 of working in proximity to but not in coordination with co-workers;  
16 she could have had occasional contact with supervisors; she could  
17 occasionally stoop and crouch; she could never crawl, kneel, or climb  
18 ropes, ladders, scaffolds; she could never work at heights or in  
19 proximity to hazardous conditions.

Tr. 1124.

20 At step four, the ALJ found Plaintiff was unable to perform past relevant  
21 work. Tr. 1132.

22 At step five, the ALJ found that, based on the testimony of the vocational  
23 expert, and considering Plaintiff's age, education, work experience, and RFC,  
24 Plaintiff could perform jobs that existed in significant numbers in the national  
25 economy, including the jobs of production assembler, small products assembler,  
26 and electrical accessories assembler. Tr. 1133.

1 The ALJ thus concluded Plaintiff was not under a disability within the  
2 meaning of the Social Security Act at any time from at any time from the alleged  
3 onset date through March 31, 2018, the date last insured. Tr. 1134.

#### 4 DISCUSSION

5 Plaintiff asserts the ALJ erred in (1) improperly evaluating the medical  
6 opinion evidence with respect to Dr. Staley, Dr. Ostrow, Dr. Williams, Craig  
7 Whittlesey, M.D. and R. Richard Sloop, M.D.; (2) improperly analyzing step three  
8 in analyzing Listing 11.02; and (3) improperly evaluating Plaintiff's symptom  
9 complaints. Plaintiff seeks a remand for the award and calculation of benefits.

10 In response, the Commissioner concedes error and agrees remand is  
11 appropriate, but only for further proceedings. ECF No. 20.

#### 12 A. Legal Standards Governing Scope of Remand

13 When the ALJ commits legal error in denying a claim for benefits, the  
14 district court "ordinarily must remand to the agency for further proceedings before  
15 directing an award of benefits." *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir.  
16 2017). The Social Security Act, however, grants district courts flexibility in certain  
17 circumstances to reverse the ALJ's decision and remand for an immediate award of  
18 benefits rather than further administrative proceedings. *Treichler v. Comm'r of*  
19 *Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014).

20 Remand for an immediate award of benefits is allowed only when three  
21 requirements (collectively referred to as the "credit-as-true" rule) are satisfied: (1)  
22 the ALJ failed to provide legally sufficient reasons for rejecting evidence, whether  
23 that evidence is claimant testimony or a medical opinion; (2) there are no  
24 outstanding issues that must be resolved before a disability determination can be  
25 made, the record is fully developed, and further administrative proceedings would  
26 serve no useful purpose; and (3) if the improperly discredited evidence were  
27 credited as true, the record as a whole would require the ALJ to find the claimant  
28 disabled on remand. *Leon*, 880 F.3d at 1045; *Garrison v. Colvin*, 759 F.3d 995,

1 1020 (9th Cir. 2014). Even if all three requirements are met, the decision whether  
2 to remand a case for further proceedings or simply award benefits is in the court’s  
3 discretion. *Washington v. Kijakazi*, 72 F.4th 1029, 1041 (9th Cir. 2023). The court  
4 may still remand for further proceedings “when the record as a whole creates  
5 serious doubt as to whether the claimant is, in fact, disabled.” *Garrison*, 759 F.3d  
6 at 1021.

### 7 **B. Proper Remedy**

8 All three steps of the credit-as-true rule are satisfied here. The first  
9 requirement is satisfied for multiple reasons. As an initial matter, the  
10 Commissioner concedes harmful legal error. The Commissioner explicitly  
11 concedes error on two of the six issues raised by Plaintiff. ECF No. 20. It is  
12 agreed the ALJ erred in weighing the medical opinions of non-examining doctors,  
13 Norman Staley, M.D. and Arnold Ostrow, M.D., and in failing to account for their  
14 opined environmental limitations. *Id.* at 5-7. Additionally, Plaintiff has  
15 established that the ALJ failed to provide legally sufficient reasons for discounting  
16 her symptom claims and harmfully erred in evaluating the evidence of Drs.  
17 Williams, Whittlesey, and Sloop. The Commissioner offers only a cursory  
18 response as to the ALJ’s rejection of Plaintiff’s symptom claims, and entirely  
19 failed to address Plaintiff’s challenges as to the doctors who examined and treated  
20 Plaintiff, Drs. Williams, Whittlesey, and Sloop. *Id.* at 9-10, 13. If a party fails to  
21 counter an argument that the opposing party makes, the court may treat that  
22 argument as conceded. The Court has no obligation to research or manufacture  
23 arguments on behalf of litigants. The Commissioner’s strategic choice not to  
24 substantively respond to these arguments constitutes concession of these issues.  
25 *See Hunt v. Colvin*, 954 F. Supp. 2d 1181, 1196 (W.D. Wash. 2013) (construing  
26 the Commissioner’s failure to respond to an argument as a concession that the  
27 plaintiff’s argument has merit and finding the “Court will not manufacture a  
28 defense on the Commissioner’s behalf where Plaintiff has identified an at least



1 plausible error”); *Johnny T. v. Berryhill*, No. 6:18-cv-00829-AA, 2019 WL  
2 2866841, at \*2 (D. Or. July 2, 2019) (finding “the Commissioner’s failure to  
3 substantively respond to Plaintiff’s arguments regarding his symptom testimony,  
4 medical opinion evidence, and lay witness testimony constitutes a concession of  
5 those issues”). As such, the Court concludes that the ALJ erred by: (1) failing to  
6 provide specific, clear, and convincing reasons to reject Plaintiff’s subjective  
7 symptom testimony; and (2) improperly evaluating the opinions of Drs. Staley,  
8 Ostrow, Williams, Whittlesey, and Sloop.

9 As for the second requirement, the Court finds further administrative  
10 proceedings would serve no useful purpose in light of the unusual posture of this  
11 case. Four administrative hearings have been held in this matter. The  
12 administrative record spans in excess of 1600 pages. Plaintiff applied for benefits  
13 in 2013 and this case involves a remote period of disability between October 2012  
14 and March 2018. Commissioner concedes the record is fully developed, yet claims  
15 there remain outstanding issues that must be resolved due to “conflicting medical  
16 opinions that must be considered and reconciled” and inconsistencies between  
17 Plaintiff’s allegations and the evidence. ECF No. 20 at 7-9. Notably,  
18 Commissioner already successfully obtained a remand for further proceedings on  
19 these grounds in 2021. *See Michele D. v. Saul*, 1:20-cv-3145-SMJ (E.D. Wash.  
20 Aug. 2, 2021) (Defendant’s Motion for Summary Judgment, ECF No. 25).  
21 Although the Commissioner identifies ways medical opinions described Plaintiff’s  
22 limitations differently (a circumstance that exists in every social security case), the  
23 ALJ has already weighed these medical opinions and failed to properly carry out  
24 that evaluation. The sole alleged “conflict” Commissioner identifies is between  
25 the 2021 opinion of Dr. Whittlesey (after the date last insured), providing that  
26 Plaintiff was unable to work, and the improperly rejected opinions of Drs. Staley  
27 and Ostrow stating Plaintiff was limited in her ability to work. These opinions do  
28 not present a significant conflict as to the relevant period such that a rehearing to



1 reconsider these opinions is necessary. Likewise, the Commissioner identifies  
2 normal findings in the record as inconsistencies with Plaintiff's allegations, but  
3 fails to connect this evidence to relevant issues that remain which would require  
4 rehearing on matters already considered by the ALJ. The Commissioner seeks not  
5 to develop unaddressed issues, but rather rehash the very same ones the ALJ has  
6 now had multiple opportunities to consider. The Ninth Circuit has stressed that  
7 precedent "foreclose[s] the argument that a remand for the purpose of allowing the  
8 ALJ to have a mulligan [to revisit the medical opinions and testimony that were  
9 improperly rejected] qualifies as a remand for a 'useful purpose' under the . . .  
10 credit-as-true analysis." *Garrison*, 759 F.3d at 1021-22 (citations omitted); *Knorr*  
11 *v. Berryhill*, 254 F. Supp. 3d 1196, 1220 (C.D. Cal. 2017) ("[R]emanding for the  
12 ALJ to reconsider this evidence, which the ALJ already had an opportunity to  
13 review, would simply be allowing the ALJ to have a second bite at the apple.").  
14 The record does not require further proceedings.

15 Third, if the improperly discredited evidence were credited as true, the ALJ  
16 would be required to find Plaintiff disabled on remand. In 2013, Dr. Williams, the  
17 consultative psychiatric examiner, opined Plaintiff: had a marked limitation in  
18 responding to usual work situations and to changes in routine work setting; had  
19 moderate limitations in her ability to make judgments on complex work-related  
20 decisions and in her ability to interact appropriately with the public, supervisors  
21 and coworkers; and was "quite limited" in her ability to work and behave in a  
22 "commercially acceptable manner." Tr. 340-41. In 2015, Plaintiff testified that  
23 despite treatment attempts, she had near constant symptoms of headaches and  
24 anxiety, an estimated 40 times per month, which caused her to lose sleep and  
25 necessitated she sit or lay down. Tr. 51-52, 59. In 2018, Plaintiff's treating  
26 provider, Dr. Whittlesey, opined Plaintiff would miss four or more days a month  
27 due to chronic fatigue and pain, Plaintiff would need to lie down at least half the  
28 day due to weakness and dizziness, and work on a regular and continuous basis

1 would cause her condition to deteriorate. Tr. 961-62. The vocational experts  
2 testified a person with this level of absenteeism or need to lie down or take extra  
3 breaks on a persistent and ongoing basis would not be able to sustain fulltime  
4 work. Tr. 68-69, 441-42, 1111-1112. Plaintiff has satisfied the requirements of  
5 the credit-as-true standard.

6 Finally, the record as a whole does not create serious doubt as to whether  
7 Plaintiff was disabled during the relevant period within the meaning of the Social  
8 Security Act. *See Garrison*, 759 F.3d at 1021. The Commissioner has not pointed  
9 to any particular aspect of this case that raises serious doubt, where the ALJ has  
10 already been afforded multiple opportunities to assess the evidence and Plaintiff  
11 has offered consistent testimony at four separate hearings. Moreover, the credit-as-  
12 true rule is a “prophylactic measure” designed to motivate the Commissioner to  
13 ensure that the record will be carefully assessed and to justify “equitable concerns”  
14 about the length of time which has elapsed since a claimant has filed their  
15 application. *Treichler*, 775 F.3d at 1100. Despite three attempts, the ALJ’s  
16 decisions continue to not be properly supported, causing extreme delay.

17 The parties agree the ALJ erred and Plaintiff has established that an award of  
18 benefits -- rather than a third remand for a fourth re-evaluation – is appropriate.

### 19 CONCLUSION

20 Having reviewed the record and the ALJ’s findings, the Court finds the  
21 ALJ’s decision is not supported by substantial evidence and not free of harmful  
22 error. The record is sufficient, no useful purpose will be served by further  
23 proceedings, and there is no serious remaining doubt as to disability. Accordingly,

### 24 IT IS ORDERED:

25 1. Plaintiff’s Opening Brief, **ECF No. 9**, is **GRANTED**. The  
26 Commissioner’s decision is **REVERSED** and this matter is **REMANDED** to the  
27 Commissioner of Social Security for the immediate calculation and award of  
28 benefits.

1           2. The Commissioner's Motion for Remand, **ECF No. 20**, is **GRANTED**,  
2 **in part**.

3           3. Upon proper presentation, the Court will consider Plaintiff's application  
4 for fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

5           The District Court Executive is directed to update the docket sheet to reflect  
6 the substitution of Leland Dudek as Defendant, enter this Order, **ENTER**  
7 **JUDGMENT** in favor of Plaintiff, forward copies to counsel, and **CLOSE THE**  
8 **FILE**.

9           DATED April 10, 2025.

10                               s/Robert H. Whaley  
11                               ROBERT H. WHALEY  
12                               Senior United States District Judge  
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